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April 2, 2013

Via Electronic Mail

The Honorable Paul A. Engelmayer
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007
EngelmayerNYSDChambers@nysd.uscourts.gov

Re: Goureau, et al. v. Goureau, et al.
Civil Action No. 12-6443

Dear Judge Engelmayer:

We have received yesterday's letter to the Court from Jaclyn H. Grodin, an attorney for the defendants, which takes the position that the Court ought not to consider plaintiff Olivier Goureau's factual reply declaration when ruling on plaintiffs' motion to amend their complaint.

The cases defendants have cited do not stand for the proposition that such a declaration must be disregarded.

- Rather, the first cited case (Judge Pauley's 2009 decision in *Capitol Records, Inc. v. MP3 Tunes, LLC*) actually embodies the *opposite* proposition, since Judge Pauley in fact considered – at length and on their merits – proposed pleading amendments that had been proffered solely by way of a declaration, and not by a proposed new pleading: “In light of Rule 15(a)'s lenient standard for amendment, this Court considers the allegations [defendant] proposes to add to the counterclaims.” (The court then rejected those proposed amendments as insufficient to state various claims.) We ask only that the Goureau declaration be likewise considered on its merits. It makes factual statements which can be incorporated in the proposed amended pleading to the effect that the parties' joint venture was in fact jointly controlled. There is nothing improper about that.
- Defendants' other citations add nothing. They merely mention in passing the unremarkable black-letter legal principle that on a motion to dismiss the court should consider not only the pleading but the annexed exhibits and anything incorporated in the pleading by reference.

The Honorable Paul A. Engelmayer

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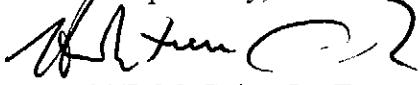
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While we doubt that a sur-reply memorandum is necessary under the circumstances, we do recognize that the Goureau reply declaration may be regarded as presenting new factual matter. Accordingly, we do not object to defendants' request to submit a sur-reply if the Court is inclined to allow it.

Yours respectfully,



Harold F. McGuire, Jr., Esq.

HFM/cd

cc: Paul D. Sarkozi, Esq. (via email sarkozi@thsh.com)

Jaclyn H. Grodin, Esq. (via email grodin@thsh.com)